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Read before Tennessee Bar Association, July 19, 1895.

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Professional duty called me before the Supreme Court of the United States on Monday, 20th May, 1895, and I saw and heard the Revolution.

It was a day of eager expectation at the national capital; Dives stood on tiptoe, but not at the door of the House of Representatives nor of the Senate Chamber, nor yet of the White House. Workmen were cleaning and renovating the walls and floors of the "Cave of the Winds," and hammer and trowel had evicted bluster and buncombe. Silver Stewart's speech had stopped, and to the "Chamber of Plutocracy" silence, like a poultice, came to heal the blows of sound. Only patriotic tourists in pairs and squads, now haunted the halls of legislation. Office-seekers and lobbyists, Congressmen, and Senators, all were gone—the memorable Fifty-third Congress had been adjourned for more than two months. Some to the setting sun had gone, and some to the rising moon; a majority had been invited to remain at home. Around the White House, too, a cemeterial quiet reigned. Its occupants had gone fishing or to the country. Legislative feet no longer hurried up executive staircases in discharge of sworn official duty. The Palace of Patronage was closed for the season.

But the Supreme Court was still in session. This was opinion day; and to-day contention would be resolved into decision. A great case had been argued before the court in the Ides of March, involving momentous issues to the public, upon which the eight justices who heard the argument were equally divided in opinion and could, therefore, give no decision on vital questions involved. A rehearing had been ordered; the absent justice had come up to court; the case

had been reargued; the question was, whether Dives must of his crescent millions, contribute to the necessary expenses of the Federal government, as Plebs demanded. At the first hearing the Nestor of the bench had said of the law under consideration: "The present assault upon capital is but the beginning; it will be but the stepping stone to others larger and more sweeping, till our political contests will become a war of the poor against the rich, a war constantly growing in intensity and bitterness. If the court sanctions the power of discriminating taxation and nullifies the uniformity mandate of the constitution, it will mark the hour when the sure decadence of our present government will commence."

Dives' ducats were in peril; he had been assaulted; his person, perhaps his life, was in jeopardy; Plebs was pugnacious; great fortunes were involved; vested rights and invested wealth were surely in danger, and also the perpetuity of the government, as Dives thought; the balance was trembling. Therefore, Dives stood on tiptoe.

Plebs, too, awaited the result with a sort of sullen anxiety. To him it seemed an issue between capital and labor, between earnings and spendings, between income and outgo. As he viewed the question, it was, whether consumption should pay all the taxes of the Federal government. tariff and excise; or investment and speculation out of their increment of profits and gains, should bear their fair share of public burdens, but the newspapers, anticipating the judiciary, had days before, assumed to announce the opinion of the court adverse to Plebs. So though doubtful of the prophetic power of the reporter, and indignant at his conceited assumption, Plebs had little hope for a favorable result.

Twelve o'clock was the hour for court to convene, and usually the court room was opened an hour earlier. But two hours before noon persons could be seen standing at the door awaiting admission, prominent among whom were the ancient spinster and the veteran loafers of the capital city, the left-overs of humanity, marital and official; while inside the clerk's office gathered the venerable, briefless barristers, eager to exercise their sitting right inside the bar of court, and reminiscent of the lawyers, judges and court scenes of the days before the Civil War. Before 11 o'clock the corridor

had become obstructed by the anxious crowd, and the capital police had ordered them into a single line, stretching far back through the cripts and corridors, even to the floor of the great dome itself. It was a motley file, of all sizes, ages, sexes, and conditions—tall and short, fat and spare, male, female, and the new woman; spick and span, and shabby genteel, white black and yellow; uniform only in an apparently superior intelligence.

The hour for opening approaches, arrives, passes; and for a full half hour the lengthening line awaits with impatience the pull of the colored janitor. At length the door is opened, the file moves in, dividing to the right and left, and quickly filling the benches in the spectators' circle on both sides the court room. The number of chairs inside the bar for counsel of court had been doubled, and extra seats for favored visitors placed in all the vacant spaces of the little court room. All these seats are quickly taken; and a new woman, entering by a side door, plies the obstructing marshal with such irresistible vocality that he not only gives way for her to plant herself upon the platform behind the bench, but even provides a chair for her well-won sitting beside the court.

Newcomers throng the entrance, fill the vacancies between benches and chairs, and along the walls and bar, and crowd to repletion even the low floor space from the bar back to the door, and out into the corridor. Every foot of space on the floor is utilized, even between the bar and the bench, where the newspaper reporters and stenographers have gathered, with pen and notebook. The Attorney-General and his assistants, including our honored ex-President Dickinson, occupy the front chairs at the bar table, and close beside sits the venerable, but vigorous James C. Carter, leader of the New York bar, who had been associated as counsel for the government in this case. Having done their duty well, they have come to judgment, "with a heart for any fate." The opposing counsel, whether confident of success, indifferent to results, or satified with the newspaper prediction, do not put in their appearance. Among the lawyers are seated Hon. Edward J. Phelps, and Belva Lockwood, too, and distinguished Senators and members of Congress of diverse views and rec-

ords upon this all-absorbing legislation. From the semi-circular wall of the little court room the portraits of the departed Chief Justices, from Jay to Waite, look down upon the crowded court room and the vacant bench with calm and fixed indifference, while the outstretched wings of the gilded eagle from the opposite wall hover over the seat of justice. The low buzz of conversation from a hundred voices fills the few remaining minutes of expectation. Let us review and summarize:

One Charles Pollock, a Massachusetts stockholder, had filed his bill in the Circuit Court of the United States at New York against the Farmers' Loan and Trust Company to enjoin its officers from making an income tax return and from paying the tax, upon the ground that the act of Congress levying it was unconstitutional, null and void; and a similar bill had been filed by one Hyde against the Continental Trust Company, of the city of New York, for the same purpose. New York counsel had brought the suit, and thus the Boston bar was behind and the Philadelphia lawyers were left. These two bills had been dismissed on demurrer, and on appeal to the Supreme Court advanced and heard together by eight Justices only. The contention was:

1. That the tax on income from rents and interest and dividends was a direct tax without apportionment, and therefore contra-constitutional.

2. That the income tax was not uniform, and was, therefore, void.

3. That the Federal tax upon income from State and municipal bonds was likewise null and void.

At the first decision all the Justices had concurred in holding "that the United States had no power under the constitution to tax either the instrumentalities or the property of a State, and therefore the tax upon income from State and municipal bonds was unconstitutional."

A majority of the eight Justices sitting had concurred in the opinion "that the law in question, so far as it levies a tax on the rents or income of real estate is in violation of the constitution, and is void."

Upon each of the other questions argued at the bar, to wit: (1) whether the void provisions as to rents and income

from real estate invalidated the whole act? (2)whether, as to the income from personal property as such, the act is unconstitutional as laying direct taxes? (3) whether any part of the tax is invalid for want of uniformity?

The Justices who heard the argument were equally divided, and therefore, no opinion was expressed.

To the opinion of the court, delivered by the Chief Justice, there were three dissenting opinions, one by the Senior Justice, that staunch old Democrat, Stephen J. Field, of a New England family whose members have achieved a world renown in their varied vocations—on the bench, at the bar, in the pulpit and in business—attaining distinctnion among their fellows for creative intelligence, strength of intellect, tenacity of will, and success in achievements which have enured to the lasting benefit, not only of their countrymen, but the whole human race. He had commented upon various features of the law with unsparing severity, denouncing especially the exemption of $4,000 as a purely arbitrary limitation, subject to the whim of future Congresses and likely to be fixed hereafter "at such an amount as a board of 'walking delegates' may deem necessary." He had also denounced the tax upon judicial salaries as in defiance of the very letter of the constitution, which declares that their compensation "shall not be diminished during their continuance in office." He was, therefore, of opinion "that the whole law of 1894 should be declared void and without binding force." Upon the contrary, the Junior Justice, White, of Louisiana, former soldier of the Confederacy, felt bound to record an elaborate and vigorous dissent, because the result of the opinion was "to overthrow a long and consistent line of decisions and to deny to the legislative department of the government the possession of a power conceded to it by universal consensus for a hundred years, recognized by repeated adjudication of the court, and necessary to the maintenance of national authority." With him, stood Mr. Justice Harlan, in holding that the tax upon rents, as well as upon interest and dividends, was valid. The other four members of the court maintained a judicial silence. It was published and generally understood, that Justices Gray and Brewer stood with the Chief Justice, and Justices Brown and Shiras upon the other

side. The unknown quantity in this great judicial problem was Justice Jackson, of Tennessee, who had been absent at the hearing and decision. And from the time when he had informed the court of his intention to be present, whenever reargument should be ordered, down to the very hour of final decision, speculation and conjecture had wearied themselves with tracing family history, social influence, natural bias and judicial record in the vain effort at foretelling on which side of the scales would be placed the casting vote that should break the balance of the tie; and some said it was a pity that the destiny of the country should depend upon the single judgment of one man, and he an invalid.

An Argus-eyed reporter, however, whose sleepless vigilance during the fortnight following the rehearing no member of the court had for a moment escaped, had assured the world that no such momentous power rested with this valetudinarian; there remained no public problem for him to solve, no public tie to break; think as he pleased, decide as he might, the question was already settled, the tie already broken; one of the judges, exercising judicial prerogative, had changed his mind, and that on the 20th of May, the Chief Justice and Justices Field, Gray, Brewer, and Shiras would concur in declaring the entire income tax law unconstitutional, null and void.

Thus stood the case and the reports thereon, when, promptly at the hour of noon, the voice of the dapper little marshal proclaimed to expectant ears the welcome words, "The Chief Justice and the Associate Justices of the United States;" and all eyes turned to the low door on the left, through which, in silken robes, filed the nine mortals who constitute the "most august tribunal upon the earth;" and assuming their several places—Justices Field, Gray, Brown, and Jackson on the Chief Justice's right, and Justices Harlan, Brewer, Shiras, and White upon his left—they stood for a moment, while the crier proclaimed, "Hear ye, hear ye, hear ye, this honorable Supreme Court of the United States is now in session. All persons having business with the court draw near and give attention, and they shall be heard. God save the United States and this honorable court." Then with the dignified courtesy always observed therein, and so eminently

becoming the occasion, the place, and the tribunal, the Justices bowed to the bar and the bar bowed to the court, all were seated, and this matter of great pith and moment, the pregnant business of the hour, hastened to its catastrophe.

As soon as the Chief Justice leaned forward and began, without preliminary remark, the rapid and distinct reading of an opinion in cases Nos. 893 and 894, all experts knew that newspaper predictions would be verified and the income tax declared unconstitutional. Yet the audience listened in an almost breathless silence to the low, distinct, and pleasant voice of the Chief Justice denouncing its invalidity. As he bent forward over the bench the great shock of white hair parted in the middle, and falling forward on either side nearly obscured his handsome, clear-cut features, and his eyes, rivited upon the manuscript, were raised but once or twice to the audience during the three-fourths of an hour occupied in reading the opinion. While he read, the other Justices settled themselves comfortably in their great leathern chairs, Justice White throwing back his head and raising his face, with eyes tightly closed, up to the panelled ceiling. Behind the Justices' chairs, and almost against the rich, red curtain that forms the background to the bench, stood a half dozen little pages, silent and attentive, while overhead the gilded eagle spread his wings over the court. Once during the reading of the opinion, when Mr. Justice Harlan, leaving his seat, was passing around behind the big red curtain, Mr. Justice White, opening his eyes, caught eagerly at the gown of the retiring Justice and arrested him for a moment. But a hurried conversation seemed to satisfy his anxiety and he relapsed into his former position. The audience gave rapt attention to the reading of the opinion, full of learning, citations and quotations, argument, distinctions and ratiocination; and the Chief Justice announced the revolution complete in the following memorable words:

"First. We adhere to the opinion already announced, that the taxes on real estate, being indisputably direct taxes, taxes on rents or income of real estate are equally direct taxes.

"Second. We are of the opinion that taxes on personal property or on income of personal property are likewise direct taxes.

"Third. The taxes imposed on the income of real estate and of personal property, being direct taxes within the meaning of the constitution, and therefore unconstitutional and void, because not apportioned according to representation—all sections of the law constituting one entire scheme of income taxation are necessarily invalid."

At the conclusion of the opinion, applause broke forth outside the bar, which, however, was promptly suppressed by the indignant little marshal, whose personal pulchritude was only excelled by his official decorum. A few reporters and others hurried out of the court room, but their places were quickly filled by other bystanders anxious to witness the entire proceedings, and catching from the electrified atmosphere the fact that, though the case was over, the contest decided, and victory perched upon the standard of Dives, yet the first scene only had been enacted, and there still remained to be performed the most interesting portion of the greatest judicial drama of our time.

Mr. Justice Harlan opened for the minority. He began reading his dissent in slow and measured tones, and in a voice slightly trembling, apparently with suppressed emotion. Soon, however, this passed away, and for a time an earnest, judicial emphasis characterized his utterance, during which he declared: "In my judgment, to say nothing of the disregard of the former adjudications of this court and of the practice of the government for a century, this decision may well excite the gravest apprehensions. It strikes at the very foundations of national authority, in that it denies to the general government a power which is, or may, at some time in a great emergency, such as that of war, become vital to the existence and preservation of the Union. It tends to re-establish that condition of helplessness in which Congress found itself during the Confederation, when it was without power to lay and collect taxes sufficient to pay the debts and defray the expenses of the government, and was dependent in all such matters upon the good will of the States."

As he further proceeded, however, the emotions of the giant Kentuckian began to assert themselves. The florid face, hitherto pale, assuming its natural color, reddened even to the high crown of the big bald head; pent up indignation burst its bounds and dominated the man; the judge seemed lost in the statesman and patriot, and thenceforth to the end the tone and manner and gesture even were those of indignant advocacy and fervent protest. "The decision now made," he said, "will inevitably provoke a contest in this country from which the American people had been spared, if the court had not overturned its former adjudications and had adhered to those principles of taxation under which our government, following the repeated adjudications of this court, had always been administered...Upon every occasion when it has considered the question whether a duty on incomes was a direct tax within the meaning of the constitution this court has, without dissenting voice, answered it in the negative, always proceeding upon the ground that capitation taxes and taxes on land were the only direct taxes contemplated by the framers of the constitution...The practice of a century in harmony with the decisions of this court, under which uncounted millions have been collected by taxation, ought to be sufficient to close the door upon further inquiry, based upon the speculation of theorists and the varying opinion of statesmen...In my judgment a tax on income derived from real property ought not to be, and until now never has been, regarded by any court as a direct tax upon such property within the meaning of the constitution...And in view of former adjudications, beginning with the Hylton and ending with the Springer case, a decision now that a tax on incomes from real property can be laid and collected only by apportioning the same among the States on the basis of numbers, may not improperly be regarded as a judicial revolution, that may sow the seeds of hate and discord among the people of our common country...In my judgment, to say nothing of the disregard of the former adjudications of this court, and of the settled practice of the government, this decision may well excite the gravest apprehensions; for by its present construction of the constitution, the court, for the first time in all its history, declares that our government

has been so framed that in matters of taxation for its support and maintenance, those who have incomes derived from the renting of real estate, or from the leasing or use of tangible personal property, or who own tangible personal property, bonds, stocks, and investments of whatever kind, have privileges that cannot be accorded those having incomes derived from the labor of their hands, or the exercise of their skill, or the use of their brains."

And then in measured tones, but with intense earnestness, the great Justice concluded this portion of his opinion with these impressive words: "If this new theory of the constitution, as I believe it to be, if this new departure from the way marked out by the fathers and so long followed by this court is justified by the fundamental laws, the American people cannot too soon amend their constitution."

Turning then to the right and apparently addressing himself to the Chief Justice and Justices Field and Gray of the majority, and possibly recalling the dissenting opinion of Mr. Justice Field at the former decision, as well as the language of counsel on argument, Mr. Justice Harlan alluded to the charge that the passage of the statute, imposing this income tax, was an "assault by the poor upon the rich," and that the tax would fall upon the people of a few States, while it was imposed by the votes of Senators and Representatives from other States; and then with vehement gesture toward them, after the matter of counsel in an exciting jury trial addressing his antagonist, he said in truculent tones: "It is a suggestion that ought never to have been made in a court of justice; and it is cause for profound regret that the highest judicial tribunal of the land has thought it appropriate to intimate that the law now before us had its origin in a desire upon the part of a majority in the two houses of Congress to impose undue burdens upon the people of particular States. If, under the bounty of the United States, or the beneficent legislation of Congress, or for any other reason, some parts of the country have outstripped other parts in population and wealth, that assuredly is no reason why people of the more favored States should not share in the burdens of government with the people of all the States in the Union... There is no tax which in its essence is more

just and equitable than an income tax that allows only such exemptions as are demanded by public considerations and are consistent with the recognized principles of the equality of all persons before the law, but which, while providing for its collection in ways that do not unnecessarily irritate and annoy the taxpayers, reaches out to every person who enjoys the protection of the law, and requires him, out of his earnings and under a rule of equality, to contribute his reasonable share to meet the burdens of the common government of all. . .Are those, in whose behalf arguments are made that rest upon favoritism by the lawmaking power to mere property and to particular sections of the country, aware that they are provoking a contest, which in some countries has swept away in a tempest of frenzy and passion existing social organizations, and put in peril all that was dear to friends of law and order? Are they yet to learn that such arguments tend to arouse a conflict that may result in giving life, energy, and power as well to those in our midst who are eager to array section against section as to those, unhappily not few in number, who are without any proper idea of our free institutions, and who have neither respect for the rights of property, nor any conception of what is liberty regulated by law?"

This act of the judicial drama occupying fifty minutes, was concluded by Mr. Justice Harlan in the following memorable words:

"The practical, if not the direct effect of the decision today is, to give to certain kinds of property a position of favoritism and advantage that is inconsistent with the fundamental principles of our social organization, and to invest them with power and influence that may be perilous to that portion of the American people upon whom rests the larger part of the burdens of the government, and who ought not to be subjected to the domination of aggregated wealth any more than the property of the country should be at the mercy of the lawless. I dissent from the opinion and judgment of the court."

While the previous reprimand of the marshal sufficed to prevent a recurrence of applause in the court room,

the earnest manner, lofty indignation, and glorified appearance of this colossal Kentuckian had fairly infected the audience, and the large majority appeared ready then and there to amend the constitution according to his suggestions, or to follow him in any other course where he might lead to prevent a future recurrence of the monstrous injustice to the people which he had so earnestly and powerfully portrayed.

Following him in dissent came Mr. Justice Jackson, of Tennessee, thin-visaged, pale and weak-voiced, but not less earnest and indignant than his giant compeer from the twin sister State. His opinion was written, but he interjected frequently oral expressions of great vigor and power, illustrating the doctrine of the text. His deliverance was slow and painful to hear, interrupted, as it often was, by paroxysms of coughing which impaired seriously the continuity of his utterance and the effect of his expressions. But he was listened to with sympathetic interest during the forty minutes of his delivery, during which he gave utterance as follows:

"In considering the question, whether a tax on incomes from real or personal estate is a direct tax, within the meaning of those words as employed in the constitution, I shall not enter upon any discussion of the decisions of this court from 1796 to 1880; nor shall I dwell upon the approval of those decisions of the great law-writers of the country and by all the commentators on the constitution; nor will I dwell upon the long-continued practice of the government in compliance with the principle laid down in these decisions. They, in my judgment, settle and conclude the question now before the court contrary to the present decision. . .The decision disregards the well-established rule or canon of construction to which I have referred, that an act passed by a co-ordinate branch of the government has every presumption in its favor and should never be declared invalid by the courts, unless its repugnancy to the constitution is clear beyond all reasonable doubt. . .Again, the decision not only takes from Congress its rightful power of fixing the rate of taxation, but substitutes a rule incapable of application without producing the most monstrous inequality and injustice between

citizens residing in different sections of their common country, such as the framers of the constitution never could have contemplated; such as no free and enlightened people can ever sanction or approve...The practical operation of the de cision is not only to disregard the great principles of equality in taxation, but the further principle that in the imposition of taxes for the benefit of the government, the burdens thereof should be imposed upon those having the most ability to bear them. Considered in all its bearings, this decision is, in my judgment, the most disastrous blow ever struck at the constitutional power of Congress. It strikes down an important portion of the most vital and essential power of the government, practically excluding any recourse to incomes from real and personal estates for the purpose of raising needed revenue to meet the government's wants and necessities under any circumstances. I, therefore, am compelled to dissent from the decision of the court, and think that it is one most disastrous in its consequences."

Justice Jackson, to whom Justice Brown had given way, upon concluding his dissent immediately left the bench, as many thought never to return. Let us hope for the better. A careful review of this opinion, in print, warrants me in saying that notwithstanding its brevity and the illness of its author, it is not excelled in comprehensive grasp of the subject, in judicial declaration of the law, nor in lofty, patriotic sentiment by any opinion delivered on this memorable day.

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The deep bass voice of Mr. Justice Brown was next heard in tones of dissent equally unmistakable, though less vehement than those preceding him. In the course of his opinion he said: "It cannot be supposed that the convention could have contemplated a practical inhibition upon the power of Congress to tax in some way, all taxable property within the jurisdiction of the Federal government for the purpose of a national revenue; and if the proposed tax were such that in its nature it could not be apportioned according to population, it naturally follows that it could not have been considered a direct tax within the meaning of the clause

in question. It is true that we have often held that what cannot be done directly, cannot be done indirectly; but this applies only when it cannot be done at all, directly or indirectly. But if it can be done directly in one manner, that is by the rule of apportionment, it does not follow that it may not be done indirectly in any other manner. There is no want of power on the part of Congress to tax land, but in exercising that power it must impose direct taxes by the rule of apportionment. The power still remains, however, to impose indirect taxes by the rule of uniformity. Being of opinion that a tax upon rents is an indirect tax upon lands, I am driven to the conclusion that the tax in question is valid."

The concluding sentences of this weigthy opinion proved its author a master of letters, as well as law, a statesman and patriot as well as a judge, and cannot be omitted in any just report of this memorable judicial field day.

"It is difficult to overestimate the importance of these cases. I certainly cannot overstate the regret I feel at the disposition made of them by the court. It is never a light thing to set aside the deliberate will of the Legislature, and in my opinion it should never be done, except upon the clearest proof of its conflict with the fundamental law. Respect for the constitution will not be inspired by a narrow and technical construction, which shall limit the necessary powers of Congress. Did the reversal of these cases involve merely the striking down of the inequitable features of this law, or even the whole law, for its want of uniformity, the consequences would be less serious; but as it implies a declaration that every income tax must be laid according to the rule of apportionment, the decision involves nothing less than the surrender of the taxing power of the moneyed class. By resuscitating an argument that was exploded in the Hylton case, and has laid practically dormant for a hundred years, it is made to do duty in nullifying not this law alone, but every similar law that is not based upon an impossible theory of apportionment. Even the specter of socialism is conjured up to dissuade Congress from laying taxes upon the people in proportion to their ability to pay them.

"While I have no doubt that Congress will find some

means of surmounting the present crisis, my fear is that in some moment of national peril this decision will rise up to frustrate its will and paralyze its arm. I hope it may not prove the first step toward the submergence of the liberties of the people in a sordid despotism of wealth.

"Believing as I do that the decision of the court in this great case is fraught with immeasurable danger to the future of the country and approaches the proportion of a national calamity, I feel it my duty to enter a protest against it."

Mr. Justice White is of ardent temperament like Mr. Justice Harlan, and his dissent, too, on this occasion was expressed in a forcible and oratorical manner. His deliverance was oral and his utterance rapid; and after the manner of the public speaker, he sought out the eyes of his auditors. Intensely earnest and entirely masterful, he held the undivided attention of the audience through the forty minutes in which he delivered his vigorous dissent, asserting, that the reargument of the case had only tended to confirm his former views and to make it more plain to him than before, that the income tax was not only just, but valid. The arguments submitted, he said, to change his former convictions, were involved in a series of contradictory theories, which he then proceeded to examine and expose, how well the following will illustrate:

"The decision here announced, holding that the tax on the income from real estate and the tax on the income from personal property and investments are direct and therefore require apportionment, rests necessarily on the proposition that the word 'direct' in the constitution must be construed in its economic sense. But this economic sense of the word applies not only to the income from real estate and personal property, but the business gains, professional earnings, salaries, and all of the many sources from which human activity evolves profit or income without invested capital. These latter, the opinion holds to be taxable without apportionment, upon the theory that they are excises, and are therefore covered by the previous decisions of this court on the subject of income taxation. But to except these things violates

the economic sense of the word 'direct' which is now adopted. It follows, I submit, that the decision now rendered adopts a rule and at once overthrows it in part; in other words the necessary result of the conclusion is to repudiate the decisions of this court previously rendered, on the ground that they misinterpreted the word 'direct' by not giving it its economic sense, and then to decline to follow the economic sense because of the previous decisions. Thus the adoption of the economic meaning of the word destroys the decisions, and they in turn destroy the rule established."

"The injustice of the conclusion points to the error of adopting it. It takes invested wealth and reads it into the constitution as a favored and protected class of property while it leaves the occupation of the minister, the doctor, the professor, the lawyer, the inventor, the author, the merchant, and all the various forms of human activity, upon which the prosperity of the people must depend, subject to taxation without apportionment. A rule which works out this result which stultifies the constitution by making it an instrument for so grievous a wrong, it seems to me, should not be adopted, especially when, in order to do so, the decisions of this court, the opinions of the law writers and publicists, tradition, practice, and policy of the government must all be overthrown....

"It is, I submit, greatly to be deplored that, after more than one hundred years of our national existence, after the government has withstood the strain of foreign war, and the dread conflict of civil strife, and its people have become united and powerful, this court should consider itself compelled by the constitution to go back to a long repudiated and rejected theory of that instrument, by which the government is deprived of an essential attribute of its being, a necessary power of taxation."

Upon the subject of apportioning taxes among the States, according to population, he said:

"I can conceive of no greater injustice than would result by imposing upon one million people in one State, having only ten millions of invested wealth, the same amount of taxes as that imposed upon a like number of people in anoth-

er State having fifty times that amount of invested wealth. The grievous results sure to follow from an attempt to adopt such a system, are so obvious that my mind cannot fail to see that if a tax on invested personal property were imposed by the rule of population, and there were no other means of preventing its enforcement, the red specter of revolution would shake our institutions to their very foundations."

These words were delivered with an unction and a fervor bordering on passion, and impressed the audience not less palpably than the impassioned utterances of the great senior dissenter.

Thus the great drama ended, and before the audience knew it, and almost without pause or period, Mr. Justice White, lowering his voice, started off rapidly into the announcement of an opinion in a private case, in which the public had no interest. Surprised at the easy transition, the auditors, as they recovered from their astonishment, gradually departed the court, satisfied that the revolution was now accomplished. They had witnessed the most striking scene, the most remarkable judicial performance of this generation. Only once since the Civil War had there been any approach to such a display of sentiment and emotion in this great tribunal, where reason and authority usually reign supreme. Men say that when a rehearing was granted upon the "Greenback Cases" the angry indignation of Chief Justice Chase found temporary expression in moistened eyes and choking voice. Dramatic indeed was this display when we recall that the intention and effect of the rehearing he resisted in those cases was to legitimate his own great child, the "Greenback Act," which his own voice had, only shortly before, annulled and disinherited. But that was individual and temporary; this was quadruple and prolonged; and, while there was sentiment, emotion, and perhaps passion at times betrayed by the dissenting judges, there was also a deliberation and premeditation in the printed words of these dissenters, protesting against and predicting the ruinous result of this judicial revolution, which only reason and conviction could give, and which served to mark the announcements of that day as the most celebrated in our judicial

annals. And whoever shall read the opinions in these cases, whether on the original or rehearing, whether the majority or dissenting opinions, will have his mind relieved of any pessimistic suspicion that we live in days of the intellectual decadence of the American judiciary.

I have called this "Revolution"; for so the dissenters all describe it, and so one of them calls it by name—"Judicial Revolution." the course of legislation and adjudication for a hundred years was in a single day upturned, and this by a bare majority of one in a court of nine, and that one a convert to the new order after deliberate judicial decision to the contrary scarce fifty days before. Of him Dives said, editorially, next morning:

"The Nation's thanks are due Justice Shiras, who has had the intelligence to perceive and the courage and candor to acknowledge that his first impressions were erroneous. But for this unselfish and patriotic action the vote of Justice Jackson would have fastened upon us a statute which most enlightened and responsible men regard as mischievous in the last degree. But for that we should now be living under the shadow of a law which punishes industry and thrift, which raises odious class distinctions, which gives the lie to the fundamental proposition that all men are equal under our institution, and the effect of which would be to overrun the country with a swarm of official inquisitors and to array the people against the government in inextinguishable bitterness and hostility. All honor to the magistrate wise enough to see all this and brave and frank enough to interpose."

Plebs spoke otherwise of the course of the Justice of Persian patronym.

Time would fail to detail the reasoning of the majority for this change of constitutional construction unprecedented in our national jurisprudence. If justification be found in the views of Mr. Justice Field at the first decision, under the law of self-defense by capital, the reason of the court is best expressed by the Chief Justice when, after quoting from the Federalist the opinions and arguments of Madison and Hamilton, he said: "In our judgment, the construction given

to the constitution by the authors of the Federalist, should not and cannot be disregarded." And yet it had been disregarded by common consent for an hundred years!

The income tax law, though enacted by a Democratic Congress, is essentially Federal legislation. To sustain it as constitutional, required Federal leaning to liberal interpretation; to declare it unconstitutional was easy for a disciple of strict construction; and so the battle was on again, as an hundred years ago, between Federalist and Democrat, between liberal and strict construction; and the duty of sustaining this Federal act was devolved upon a Democratic administration. That it was done faithfully and ably, no one will question who has read the brief or heard the argument of the Attorney-General. That the law failed was surely no fault of his. But mark the party affiliation, sectional origin, and personal antecedents of the actors in this case!

The four Democrats on the bench were equally divided in opinion, while the Republicans stood three to two against the law. Every Southern judge upheld the law, and the two who had been Confederates in the Civil War and Democrats ever since, maintained most stoutly in this judicial contest the paramount authority of the Federal government. The strict construtionists, on the contrary, were all Northern men, of Eastern birth—four of New England parentage and one of Pennsylvania. The Revolution of 20th May, 1895, is political as well as judicial, and the whirligig of time has brought us face to face with the fact that, while in this great representative court five-sixths of the North antagonizes and restricts the power and authority of the Federal government to its narrowest limits, the South appears, through its three representatives, without dissent or discord, as the doughty champion of national sovereignty and Federal authority. Note, too, that the three Justices from the great, central Sixth Circuit, extending over fourteen degrees of latitude, from Chattanooga to Isle Royale, balanced across "Mason and Dixon's line," and most representative of the varied interests and genuine American population of the United States, all concurred in sustaining the congressional power of income taxation.

What shall be the ultimate result of this judicial revolution may not appear in this country. Its immediate effect is, however, already apparent. The aggregated wealth, the invested capital, whose accumulation is due to favorable Federal legislation more than any other one cause, contributes nothing to the support of this government, whose biennial expenses are a billion dollars, while the average citizen, through the indirect taxes, tariff and excise, paid upon articles of consumption, bears not only the entire burden of the expenses of the national government, but also the expenses entailed by that favoring legislation which swells the annual income of capital and wealth to fabulous dimensions.

No great public contention is finally settled till it is settled aright. Decisions of questions of public justice must rest at last upon the immutable foundations of eternal justice! Forty years ago the owners of peculiar property in the South appealed to the Federal courts for protection against the aggressive agitation of the dominant sentiment of the Christian world. They obtained it in the constitutional construction of the fugitive slave law; and the Dred Scott decision became famous on two continents. But the contention involved in that case could not abide such judicial decision; agitation increased and it was settled on appeal to arms and by wager of battles, only when the flag of the Lost Cause was furled forever at Appomatox in 1865. In 1895 the owners of vast property in the North appealed to the Federal courts for protection against the popular demand that they who get the benefits of government shall bear their just share of its expenses; and they get it in this decision of the Supreme Court in the income tax cases; Dives wins, Plebs loses. Is the contention settled?